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The Public Trust Doctrine In The Exclusive Economic Zone

INTRODUCTION

On March 10, 1983, President Reagan issued a Proclamation establishing an "exclusive economic zone" (EEZ) extending 200 nautical miles from the baseline from which the territorial sea is measured.[1] The Proclamation claims for the United States "sovereign rights for the purpose of exploring, exploiting, conserving, and managing natural resources, both living and nonliving, of the seabed and subsoil and the superjacent waters," as well as for the

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[1] Proclamation No. 5030, Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10,605, codified at 3 C.F.R. § 5030 (1985). *See also* Statement by the President on U.S. Oceans Policy of March 10, 1983, 19 WEEKLY COMP. PRES. DOC. 383-85 (Mar. 14, 1983). Hereinafter, "mile" will mean the nautical mile referenced in the EEZ Proclamation. A nautical mile is 1,852 meters while a statute mile equals 1,609 meters.

protection of the marine environment.[2] As a result, the United States is asserting jurisdiction over ocean resources covering an area of over six million square miles, an area representing approximately one and a half times the total land mass of the United States.[3]

The Proclamation, announced just three months after the United States refused to sign the United Nations Convention on the Law of the Sea (hereinafter LOS Treaty),[4] reflects the United States' acceptance of the LOS Treaty version of the EEZ concept that emerged from the United Nations Conference on the Law of the Sea (hereinafter UNCLOS III) negotiations.[5] However, it is only the latest in a series of events whereby the U.S. government has enclosed ocean space for the purposes of conserving and exploiting the resources contained therein. A number of laws affecting management of ocean resources within 200 miles of the coast already were in place when President Reagan announced formal creation of the EEZ.

A fair question, then, is what impact does the EEZ Proclamation have on domestic marine resource law?[6] Does it impose any new responsibilities on the federal government or is it merely an executive branch affirmation of pre-existing legislative assertions of jurisdiction over marine resources? Resources claimed under the Proclamation are public resources which the government holds in trust for the people of the United States. The formal establishment of sovereign rights arguably carries with it an increased role of public stewardship over these resources.[7] To ensure that these

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[2] 3 C.F.R. § 5030.

[3] Charles N. Ehler and Daniel J. Basta, *Strategic Assessment of Multiple Resource-Use Conflicts in the U.S. Exclusive Economic Zone*, OCEANS '84 CONFERENCE PROCEEDINGS (Sept. 1984).

[4] United Nations Convention on the Law of the Sea, opened for signature December 10, 1982, U.N. Doc. A/Conf. 62/122 (Oct. 7, 1982), *reprinted in* 21 INT'L LEGAL MATERIALS 1261 (1982). The Reagan administration rejected the Treaty because the provisions relating to the mining of deep seabed mineral resources are allegedly incompatible with the ideology of free enterprise.

[5] *Id.* at art. 56. Note that although the concept of the EEZ is accepted in customary international law, coastal nations differ on the extent of sovereignty asserted within the zone.

[6] The EEZ clearly has international implications. These, however, are beyond the scope of this paper. For a recent discussion of the EEZ concept in international law, see Charney, *The Exclusive Economic Zone and Public International Law*, 15 OCEAN DEV. & INT'L L.J. 233 (1985).

[7] Two well-known ocean policy writers assert that implicit in the notion of the EEZ is a higher level of governmental authority over and responsibility for marine resources than existed before the announcement of the EEZ Proclama-

trust resources are adequately protected, the courts should adopt the public trust doctrine, thereby creating a judicially enforceable public trust override in their management.

This Article analyzes the public trust doctrine as applicable to resource management decisions in the EEZ. The first section is a brief discussion of the evolution of expanded coastal nation jurisdiction over EEZ resources formerly regarded as common property resources for all world citizens. The second part reviews the perimeters of the upland and tidelands public trust doctrines in United States law. The final section describes the use of the tidelands trust as an appropriate vehicle for assuring that the federal government does not abrogate its trust responsibilities in the EEZ.

I

EVOLUTION OF THE EXCLUSIVE ECONOMIC ZONE

"Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea."[8]

Throughout maritime history, debate has raged over the extent to which a nation has the right to assert sovereignty over the world's largest commons—the sea. Until recent times, a nation's control over the natural resources of the ocean was limited to a relatively narrow band of water adjacent to the coast. Within this zone, generally referred to as the territorial sea, coastal nation states had the exclusive right under international law to regulate foreign and domestic fishing, as well as commerce and navigation. The width of the territorial sea has fluctuated widely throughout history,[9] but by the time UNCLOS III convened in the early 1970's, most states accepted twelve miles or less as the permissible

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tion. Cicin-Sain & Knecht, *The Problem of Governance of U.S. Ocean Resources and the Exclusive Economic Zone* published in abbreviated form in EXCLUSIVE ECONOMIC ZONE PAPERS (1984). This paper was presented at the First Meeting of the National Ocean Policy Roundtable, Airlie House, Virginia (Nov. 28-30, 1983) (discussion draft).

[8] THE INSTITUTES OF JUSTINIAN Lib. II, Tit. I, § I (T. COOPER trans. & 3d ed. 1852).

[9] Several prominent scholars have written about the development of the territorial sea. T. FULTON, THE SOVEREIGNTY OF THE SEA (1911); P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS (1962); C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (6th rev. ed. 1967); L. SOHN, THE LAW OF THE SEA (1984); Pardo, *The Law of the Sea: Its Past and its Failures*, 63 OR. L. REV. 7 (1984).

distance.[10] The area of ocean outside the territorial sea, known as the high seas,[11] was considered a commons where all nations had the right to exploit the resources while maintaining a reasonable regard for the concomitant rights of others to carry on similar activities. In other words, it was understood that one nation could not unreasonably interfere with another's exercise of the common rights. Under the free access principles of the high seas, regulation of fisheries outside territorial sea areas was effectuated by explicit agreements and customary practices among nations having an interest in the fishery.

By the middle of the twentieth century, it became apparent that the traditional methods of regulating marine fisheries were not sufficient to protect these resources from overexploitation. As a result, exclusive fishery zones began to emerge and encroach upon the high seas. The United States initiated this worldwide movement in 1945 when President Truman announced the "Fisheries Proclamation."[12] This Proclamation asserted the right of the federal government to establish fishery conservation zones in areas of the high seas contiguous to the U.S. coast in order to regulate fishing activities of U.S. nationals. Such zones were deemed necessary to conserve and protect the coastal fisheries. With respect to foreign fishermen, the Proclamation suggested the development of international agreements.[13] It also asserted that the United States would respect the corresponding rights of other nations to establish conservation zones so long as the foreign government recog-

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[10] Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 SAN DIEGO L. REV. 561 (1983) (citing OFFICE OF THE GEOGRAPHER, U.S. DEPARTMENT OF STATE, NATIONAL MARITIME CLAIMS (1982)).

[11] A third area called the "contiguous zone" overlaps into the high seas near the territorial sea border. In general, high seas rights are enjoyed in this area. However, coastal nations do have limited extraterritorial jurisdiction for purposes of enforcing domestic, security, and sanitary laws. *Id.*

[12] Proclamation No. 2668, Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12,303 (Sept. 28, 1945), *reprinted in* 59 Stat. 885 (1945).

[13] "Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements." *Id.*

nized any existing fishing interests of U.S. nationals in such zones.[14]

At the time he announced the Fisheries Proclamation, President Truman also asserted U.S. authority over the exploitation of marine minerals out to the edge of the continental shelf.[15] Until that time, the two dominant international law of the sea issues had been fisheries and navigation. By the mid-twentieth century, however, development of new technology had made the commercial exploitation of seabed mineral resources economically feasible. Under the auspices of promoting the orderly development of these resources (mainly oil and gas), President Truman reserved for the United States the natural resources of the continental shelf contiguous to the U.S. coast. Boundaries potentially conflicting with adjacent coastal nations were to be negotiated bilaterally in accordance with equitable principles. The Proclamation specifically refrained from asserting territorial sovereignty over the superjacent high sea waters.[16]

These two unilateral extensions of jurisdiction onto the high seas were answered by a series of assertions of jurisdictional authority by other coastal nations. The degree of authority and extent of jurisdiction claimed varied from country to country.[17] It is widely regarded that these actions marked the beginning of what

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[14] "The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas." *Id.*

[15] Proclamation No. 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 10 Fed. Reg. 12,303 (Sept. 28, 1945), *reprinted in* 59 Stat. 884 (1945). The United States was not the first nation to assert rights over continental shelf mineral resources. On August 6, 1942, Great Britain announced the "Submarine Areas of the Gulf of Paria (Annexation) Order." 4 WHITEMAN DIGEST OF INTERNATIONAL LAW 804-08 (1965).

[16] "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." Proclamation No. 2668, Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12,303 (Sept. 28, 1945), *reprinted in* 59 Stat. 886 (1945).

[17] Peru, *Presidential Decree No. 781* (Aug. 1, 1947), *reprinted in* 4 WHITEMAN DIGEST OF INTERNATIONAL LAW 797 (1965); *Declaration of Santiago of August 18, 1952, reprinted in* 4 WHITEMAN DIGEST OF INTERNATIONAL LAW 1089-90 (1965). The Declaration of Santiago arguably proclaimed a territorial sea of 200 miles off the coasts of Chile, Ecuador, and Peru. See Hollick, *The Origins of 200 Mile Offshore Zones*, 71 AM. J. INT'L L. 494 (1977) for a discussion of the enclosure of high seas resulting from the 1945 Truman Proclamations.

eventually evolved into the 200 mile EEZ as embodied in the UNCLOS III Treaty.

Several years elapsed before Congress passed legislation giving domestic force to the 1945 Proclamations. The Submerged Lands Act[18] (SLA) and the Outer Continental Shelf Lands Act[19] (OCSLA), both passed in 1953, established a framework for the orderly development of mineral resources on the outer continental shelf (OCS). In 1964, Congress restricted fishing within the territorial sea to U.S. vessels.[20] Two years later, it extended this exclusive fishery zone to twelve miles from the coast.[21] During the decade of the 1960's, approximately thirty-two other nations laid similar claims.[22] Congress expanded the scope of federal jurisdiction beyond the territorial sea to include pollution control with the passage of the Marine Protection, Research and Sanctuaries Act (MPRSA) in 1972.[23] The MPRSA has two major parts. Title I, also known as the Ocean Dumping Act, establishes a permit system for the intentional dumping of materials into ocean waters. This title regulates the dumping activities of U.S. nationals in all ocean waters and of foreign nationals within twelve miles of the U.S. coast. Title III sets up a procedure for the designation of marine sanctuaries in ocean waters as far seaward as the outer edge of the continental shelf. The purpose of a marine sanctuary is to preserve or restore select marine areas for their conservation, recreational, ecologic, and/or aesthetic values.

It was not until 1976 that Congress passed comprehensive legislation governing fishery resource management beyond the 12-mile

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[18] 43 U.S.C. §§ 1301-1356 (1982). The SLA gave the coastal states paramount control over mineral resources within three miles of the coast or out to nine miles for states bordering the Gulf of Mexico that could show a greater exercise of territorial control at the time of their admittance to the Union.

[19] 43 U.S.C. §§ 1331-1356 (1982). The term "outer continental shelf" is defined in reference to the Convention on the Continental Shelf, an international treaty that resulted from the first United Nations Law of the Sea Conference in 1958. The OCS is defined therein to extend to "a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." Convention on the Continental Shelf, art. 1, 15 U.N.T.S. 471, executed at Geneva on April 29, 1958, ratified March 24, 1961; entered into force June 10, 1964.

[20] The Bartlett Act of 1964, Pub. L. No. 88-308, 78 Stat. 194 (1964).

[21] The Contiguous Fishing Zone Act, Pub. L. No. 89-658, 80 Stat. 908 (1966).

[22] Hollick, *supra* note 17, at 494.

[23] 33 U.S.C. §§ 1401-1445 (1982) (Title I); Marine Sanctuaries Amendment of 1984, 16 U.S.C. §§ 1431-1434 (1985) (Title III).

exclusive fishery zones. The Magnuson Fishery Conservation and Management Act (MFCMA) creates a regime for managing the fisheries off the U.S. coast within "a zone contiguous to the territorial sea [extending out] to a line 200 nautical miles from [shore]."[24] This substantial extension of exclusive fisheries jurisdiction from 12 to 200 miles, which occurred simultaneously with the UNCLOS III negotiations over a 200-mile EEZ, evidenced Congress's growing concern over the decline of the U.S. fishing industry as well as its impatience with the pace of the international negotiating process in resolving fishery management problems.[25] The MFCMA essentially authorizes the federal government to regulate all domestic and foreign fisheries within 200 miles of the U.S. coast.

The final significant encroachment into former high seas commons occurred in 1983 when President Reagan announced the creation of a United States Exclusive Economic Zone. Today, as a result of the proliferation of EEZ-like claims by coastal nations, almost one-third of all ocean space has been enclosed.[26]

II

Public Trust Doctrine

Under the public trust doctrine, government has an obligation to protect the public's interest in certain common resources. In the United States, the concept has different origins for marine and upland resources. To understand the application of the public trust doctrine to EEZ resources, it is helpful to understand the historic development of the concept.

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[24] 16 U.S.C. §§ 1801-1882 (1982).

[25] In fact, the debate over passage of the MFCMA included the appropriateness of such congressional action during the course of international negotiations by the Executive Branch. The State Department, among others, felt that the legislation would hamper the development of an international agreement on fisheries jurisdiction. Representatives from the fishing industry and others predicted that such action would accelerate international negotiations while simultaneously protecting U.S. fishery interests. *Extending the Jurisdiction of the United States Beyond the Present Twelve-Mile Fishery Zone: Hearings Before the Subcommittee on Fisheries and Wildlife, Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. (1975). Recognizing that a treaty could be completed following passage of the MFCMA, Congress included a provision in the Act authorizing the Secretary of Commerce, after consultation with the Secretary of State, to amend fisheries regulations to conform with the Treaty. 16 U.S.C. § 1881 (1982).

[26] Alexander, *supra* note 10, at 561.

A. The Tidelands Trust

The public trust over marine resources generally is believed to have developed from Roman and English law.[27] Roman law provided its citizens with expansive common rights in certain property, including resources of the sea. Although the government exercised sovereignty over the sea, it claimed no property rights therein distinct from those exercised by the citizenry. In other words, the ocean and its resources were incapable of individual ownership.[28] As a result, the public gained virtually unlimited rights in fishing and navigation, the two prevalent uses of the ocean at the time.

A similar but more limited doctrine developed in the common law of England where the monarchy reserved the right to claim sovereign ownership in ocean and coastal resources. With the passage of time, the King divested much of these areas to lords loyal to him. As a result, sovereign claims became virtually indistinguishable from private property-like alienation rights. The signing of the Magna Charta marked the end of this trend toward privatization and the beginning of the more modern law of public trust.[29] While the King retained sovereign rights in the common property resources, he was not permitted to appropriate them for his own use or the private use of others. Instead, he was to act as trustee for the public's rights in such resources.[30]

The primary difference between Roman law and English common law, then, lay in the concept of ownership. Roman law provided no basis for the sovereign to interfere with the public's use of the oceans. The monarch under the English public trust, on the

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[27] This discussion of the historic origins of the tidelands trust necessarily is brief. For more detailed analyses, see Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970) (hereinafter cited as *The Public Trust in Tidal Areas*); R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECTS IN THE SEASHORES OF THE REALM (2nd ed. 1875); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195 (1980); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

[28] *See supra* note 8. *See also* H. SCHULTES, AQUATIC RIGHTS 2 (1839), *cited in The Public Trust in Tidal Areas*, *supra* note 27, at 763 n.7.

[29] Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 366, 410 (1842) ("The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But . . . the question must be regarded as settled in England against the right of the King since the Magna Charta to make such a grant [of submerged lands].").

[30] *The Public Trust in Tidal Areas*, *supra* note 27, at 768-769.

other hand, retained rights of sovereign ownership limited by a resource easement in favor of the public.[31]

The public trust doctrine that has developed in the United States includes aspects of both the Roman and English versions. It is more akin to English than Roman law,[32] however, primarily because of the influence of English property law in early U.S. history. An early recognition of the public trust doctrine in the United States by the Supreme Court came in 1842 in *Martin v. Lessee of Waddell*.[33] There, the Court held that when the United States won its independence from the British, the citizens of each state became successors to the King's sovereign rights over the resources in tidal areas, subject only to any superior rights surrendered to the federal government by the states upon admission to the Union.[34] As the law developed, state governments assumed the role of the sovereign, holding title to tidal lands and the resources contained therein, with a concurrent trust obligation in favor of their respective citizens.[35]

The leading Supreme Court case interpreting the government's role is *Illinois Central R.R. v. Illinois*.[36] *Illinois Central* involved

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[31] Parliament, currently the primary governing body in England, appears to have greater rights than the monarch to enlarge or diminish public rights in common property resources. Sax, *supra* note 27, at 476.

[32] Some writers believe the current trend in U.S. law is toward the broader protectionist stance of Roman law. *Public Trust in Tidal Areas*, *supra* note 27; Stevens, *supra* note 27.

[33] 41 U.S. (16 Pet.) 366.

[34] The now famous quote is as follows:

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the federal government.

Id. at 410.

[35] Generally, such state sovereignty has extended inland to all tidally influenced navigable waters and seaward to three miles from the coast. As could be expected, such a generality is not without its exceptions. In fact, a body of law has developed nationwide over this issue. And in many states, the boundaries still are not settled. Cinque Bambini Partnership v. State of Mississippi, Supreme Court Docket No. 55,306, argued Sept. 27, 1984 (does "navigable waters" for public trust purposes mean "navigable in fact?"); United States v. Louisiana, 105 S. Ct. 1074 (1985) (Alabama and Mississippi Boundary Case) (Mississippi Sound qualifies as an historic bay and therefore is inland waters for purposes of delimiting the territorial sea); United States v. Maine, 105 S. Ct. 995 (1985) (Rhode Island and New York Boundary Case); United States v. Louisiana, 349 U.S. 11 (1969); United States v. California, 381 U.S. 139 (1965).

[36] 146 U.S. 387 (1892).

an attempt by the Illinois legislature to rescind a prior grant to the Illinois Central Railroad Company of over 1,000 acres of shoreline on Lake Michigan. The Court found the original grant invalid on public trust grounds. It held that a state cannot alienate public trust property if such reallocation results in subjecting public uses to private interests. The Court determined that a state may dispose of public trust lands only on a showing that its action does not result in the wholesale divestiture of its authority over public resources, or that doing so furthers some other trust purpose. Thus the Court set the stage for a "judicial model of skepticism" when reviewing government actions which attempt to narrow broad public uses of resources.[37]

A judicially enforceable public trust doctrine over tidelands has developed separately, albeit similarly, in the fifty states since *Martin*. *Illinois Central* serves as the basic guideline from which states have shaped their roles as trustees, but the concept remains a fluid one. It has been used as a tool to prevent private interests from controlling the sea and its associated coastal tidelands. It seeks to conserve the natural resource, recreational, ecologic, and aesthetic values of these areas for the benefit of the public at large.[38] Its theoretical underpinnings have evolved from the Roman law's no-

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[37] "The model for judicial skepticism that it [*Illinois Central*] built poses a set of relevant standards for current, less dramatic instances of dubious governmental conduct. For instance, a court should look skeptically at programs which infringe broad public uses in favor of narrower ones. Similarly, there should be a special burden of justification on government when such results are brought into question." Sax, *supra* note 27, at 491.

[38] The *Illinois Central* case dealt primarily with the divestiture of traditional public uses—navigation, commerce, and fisheries. A review of recent public trust cases reveals a trend toward the expansion of uses that may be protected by the trust to include, for example, bathing, swimming, recreational boating, and ecological study. Stevens, *supra* note 27, at 221-223. *See* Morse v. Oregon Division of State Lands, 34 Or. App. 893, 581 P.2d 520 (1980) (public trust protects public uses of navigation, fishing, and recreation); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969) (trust protects right of navigation together with its "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes"); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (public trust encompasses bathing, swimming, fishing, hunting, boating, general recreation, anchoring, and ecological study); Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928) (oil and gas development a legitimate trust use). Note that since this case in 1919, California has experienced a "change of heart" regarding the priority of oil and gas development over protection of other public trust uses. California now is one of the leading coastal state voices protesting federal offshore oil and gas activity that potentially would affect California's public trust uses of coastal waters. *See, e.g.*, California v. Watt, 463 U.S. 1248 (1983).

tion that the sea is a public commons, incapable of private ownership. As a result, the public has been given an enforceable legal right against the government for actions that subordinate public interests in tidelands to private ones.

B. The Upland Public Land Trust

Approximately one-third of the land in the United States is owned by the federal government. These public lands and the natural resources within them are held by the government for the benefit of its citizens. Over the past 100 years, a common law public trust doctrine, separate from the tidelands trust, has developed with regard to these public lands.[39]

Early court decisions ruled that public lands were held in trust for the citizens of the United States.[40] The prevailing public policy was to encourage settlement of western lands. Accordingly, the courts gave Congress broad deference in decisions that made these lands available for homesteading and mineral claimstaking. Unlike the tidelands trust, the public land trust was not burdened with severe restrictions on alienation. Since the United States acquired the western territory by discovery or purchase, it was deemed to have the sole right of ownership and disposal.[41] As a result, a complex body of statutory law developed to sell and otherwise transfer public lands for settlement.

Public land law at the end of the nineteenth century was aimed primarily at opening the frontier for individual families to set up small farms. Allocation laws were designed to prevent the development of large-scale land monopolies and to encourage homestead-

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[39] "Public lands" referred to in this section of the article do not include lands under navigable waters. These lands were acquired by the states at the time of statehood and are subject to a public trust parallel to that in tidelands. Shively v. Bowlby, 152 U.S. 1, 49 (1893). Indian treaty lands also are excluded from this discussion. A separate body of law has developed for these lands. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357 (1978).

[40] "They [public coal lands] were held in trust for all the people; and . . . in the discharge of a high public duty and in the interest of the whole country, [the government] sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value." United States v. Trinidad Coal Co., 137 U.S. 160, 170 (1890). *See also Shively*, 152 U.S. 1; Camfield v. United States, 167 U.S. 518 (1897); Light v. United States, 220 U.S. 523 (1911).

[41] *Shively*, 152 U.S. at 51.

ing. The courts, like Congress, staked out a strong protectionist policy for individual settlers.[42]

Early in the twentieth century the "great give-away" policy began to yield to a movement toward federal retention and management of public lands and their valuable natural resources. Since then, Congress has passed legislation withdrawing a significant amount of federal land from the Homestead Laws.[43] The courts consistently have upheld such land reservations under a broad public trust rationale.[44]

The public land trust, then, is a common law concept imposed by the courts on Congress. Because of the broad power conferred upon Congress under the property clause of the Constitution, the courts have granted Congress enormous discretion in defining the boundaries of the trust.[45] As a result, purposes of the trust have changed over time. In turn, Congress has delegated a significant amount of authority over federal land management decisions to

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[42] "[B]ut it [the federal government] would be recreant in its duties as trustee for the people of the U.S. to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market." *Camfield*, 167 U.S. at 524. *See also* United States v. Beebe, 127 U.S. 338 (1888) (affirming the government's right to set aside land patents fraudulently obtained).

[43] Withdrawal statutes include: 16 U.S.C. §§ 21-26 (1982) (the creation of Yellowstone National Park); Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1982) (authorizes the President to establish national monuments); Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-293 (1982) (withdrawal of certain minerals on public lands from mining location laws); Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316 (1982) (withdrawal of certain lands from operation of homesteading laws); and Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629 (1982) (temporary withdrawal of certain Alaska lands from resource use or development).

[44] For example, in *Light*, 220 U.S. 523, the Supreme Court upheld the federal government's right to prohibit grazing in an established forest reserve as a legitimate exercise of the government's trust responsibilities.

[45] U.S. CONST. art. 4, § 3. The Supreme Court has repeatedly deferred to congressional interpretation of the public land trust. Alabama v. Texas, 347 U.S. 272 (1954) (upholding the constitutionality of the Submerged Lands Act); United States v. San Francisco, 310 U.S. 16, 29 (1940) ("The power over the public lands thus entrusted to Congress is without limitations. 'And it is not for the courts to say how the trust is to be administered.' " citing *Light*, 220 U.S. at 537). One writer argues that this line of reasoning could permit the legislature to pass statutes that result in repudiating the trust. He suggests that courts should interpret any such statutes narrowly, thereby forcing Congress to override the trust publicly and explicitly. According to this theory, this tactic would succeed because it would be politically unacceptable for Congress totally to abdicate its trust responsibilities. Note, *The Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977). *See also*, Sax, *supra* note 27, at 558-64.

administrative agencies, whose actions are subject to the same judicial scrutiny.[46] Although the courts have assumed only a limited role in enforcing a public land trust, their influence has been important in defining the trust responsibilities.[47]

III

PUBLIC TRUST IN THE EEZ

Two possible common law sources, then, exist for a judicially enforceable federal public trust in the EEZ. The next question addressed is whether either one or both is applicable to EEZ resource allocation/management decisions. Because both versions of the doctrine recognize legislative administration of the trust, a review of pertinent statutes affecting marine resources is necessary to determine the extent to which the judiciary is left with a role in shaping federal public trust law in the EEZ.

Since the Truman Proclamations in 1945, the federal government has been actively setting policy for resource allocation and management decisions in what is now formally designated the EEZ. At least seventeen laws that directly affect marine resource use, protection and development have been passed since that time.[48] The present discussion reviews the following laws and the

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[46] The Bureau of Land Management and the Park Service (both located in the Department of the Interior) and the Forest Service (located in the Department of Agriculture) are the agencies primarily responsible for management of federal lands.

[47] "The Secretary [of the Interior] is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it." Knight v. United Land Assoc., 142 U.S. 161, 181 (1891), *cited with approval* in Sierra Club v. Department of Interior, 376 F. Supp. 90, 93 (N.D. Cal. 1974), 398 F. Supp. 284, 287 (N.D. Cal. 1975), 424 F. Supp. 172 (N.D. Cal. 1976) (known as *The Redwood Park cases*). The *Redwood Park cases* appear to recognize a common law trust parallel to the statutory trust created by the National Park enabling legislation. Another district court, however, found that the Redwood National Park Act Amendments of 1978 extinguished the judicial trust in favor of a specific statutory one. Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980), *aff'd*, 659 F.2d 203 (D.C. Cir. 1981) (no discussion of the public trust issue).

[48] Submerged Lands Act, 43 U.S.C. §§ 1301-1356 (1982); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982); Marine Resources and Engineering Development Act, 33 U.S.C. §§ 1101-1108 (1982); National Environmental Policy Act, 42 U.S.C. §§ 4331-4361 (1982); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 662-667 (1982); Port and Waterways Safety Act, 33 U.S.C. §§ 1221-1232 (1982); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407

mechanisms they contain to administer trust resources: Submerged Lands Act and Outer Continental Shelf Lands Act; Marine Protection, Resource and Sanctuaries Act; Magnuson Fishery Conservation and Management Act; National Environmental Policy Act; Marine Mammal Protection Act; and Endangered Species Act.

A. Major Resource Laws

1. Submerged Lands Act and Outer Continental Shelf Lands Act

The first and probably most significant legislation came into effect in 1953 with the passage of the Submerged Lands Act (SLA)[49] and the Outer Continental Shelf Lands Act(OCSLA)[50]. These laws, seen together as an affirmation of Truman's 1945 Continental Shelf Proclamation, establish general guidelines for leasing the resources of the OCS.

The OCSLA, which vests in the federal government exclusive management of continental shelf mineral resources beyond three miles from the coast, was Congress's first substantial foray into territory beyond the territorial sea. Aware that development of OCS resources posed potential conflicts with traditional common uses of the waters superjacent to the shelf, Congress specified that the OCSLA was not to be construed to interfere with navigation and fishing rights in the area.[51] The law was amended significantly in 1978 with the goal of expediting a systematic development of OCS mineral resources in a manner consistent with protection of the marine and coastal environments. The legislative history of the amendments, along with specific language of the

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(1982); Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-467 (1982); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1982); Marine Sanctuaries Amendments of 1984, 16 U.S.C. § 1431-1439 (1985); Magnuson Fishery, Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1982); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1982); Deepwater Ports Act, 33 U.S.C. §§ 1501-1524 (1982); National Ocean Pollution Planning Act, 33 U.S.C. §§ 1701-1709 (1982); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (1982); Ocean Thermal Energy Conversion Act, 42 U.S.C. §§ 9101-9167 (1982); Limitation of Liability Act, 46 U.S.C. §§ 181-196 (1982).

[49] 43 U.S.C. §§ 1301-1356.

[50] 43 U.S.C. §§ 1331-1356.

[51] *Id.* § 1332.

Act itself, indicate that Congress perceives a public trust responsibility over the OCS:

> The OCS lands and the resources of those lands are public property, which the Federal Government holds in behalf of the people of the United States. Therefore, the Government has a duty to properly and carefully manage this vital natural resource reserve, so as to obtain fair value for the resources, protect competition, preserve the environment, and generally reflect the public interest.[52]

The Offshore Oil Spill Pollution Fund provision of the OCSLA entitles the President of the United States, "as trustees for the natural resources over which the Federal Government has sovereign rights or exercises exclusive management authority," to recover from the Fund expenses to restore or replace marine resources destroyed or injured by oil pollution.[53] The Fund also is available to finance the removal of oil spilled or discharged into the ocean, and to pay affected fishermen for damages such as loss of profits or impairment of earning capacity occasioned by injury to or destruction of marine resources.[54]

The legislative history indicates Congress's awareness that OCS mineral development could conflict with other legitimate public uses, particularly fishing and recreation.[55] It therefore attempted in the OCSLA to strike a balance between these competing uses by directing the Secretary of the Interior to develop a permit system and establish regulations protecting the aquatic environment. The permit criteria must provide that the activity will not unduly harm aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site of historic or archeologic significance.[56] In addition, Congress instructed the Secretary of the Interior to develop safety, regulatory, and enforcement procedures encourag-

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[52] H.R. REP. NO. 590, 95th Cong., 2d Sess. 122, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1528. "[T]he outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3).

[53] 43 U.S.C. § 1813(b)(3).

[54] *Id.* § 1813.

[55] OCSLA Amendments of 1978, H.R. REP. NO. 590, 95th Cong., 2d Sess. 122, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1528. Oil and gas were the primary mineral resources exploited at the time the amendments were passed, and remain so today.

[56] 43 U.S.C. §§ 1334(a), 1340(g), 1346(d); 30 C.F.R. §§ 250, 251 (1985).

ing the development of new and improved technology to minimize risks to the marine environment.[57] Environmental studies of proposed lease sale areas must be conducted at both the pre- and post-lease stages in order to assess potential impacts of development on the human, marine, and coastal environment.[58]

Congress further provided that those states and local governments affected, as well as the public, with the opportunity to comment at each stage of the process — from the development of the five-year lease plan to permit granting to enforcement.[59] Finally, the Secretary of the Interior is authorized to temporarily suspend any lease or permit if a threat of serious, irreparable, or immediate harm to the marine, coastal, or human environment is apparent.[60] If after a hearing, the Secretary determines that continued activity pursuant to a permit or lease would cause serious harm to the marine environment, that the threat of such harm would not decrease significantly within a reasonable period of time, and that the advantages of cancellation outweigh continuance of the lease, the lease or permit can be terminated.[61]

Included in the OCSLA is a citizen suit provision that allows the public to sue any person, including a governmental agency, alleged to be in violation of the Act, its accompanying regulations, or the terms of any lease or permit issued under the Act.[62]

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[57] 43 U.S.C. §§ 136-1348. At least one court has construed the statutory duty of "best available and safest technology" to be an evolutionary, not a fixed one. National Wildlife Fed'n v. Andrus, 642 F.2d 590, 613 (D.C. Cir. 1980). Congress evidently envisioned the possibility that the Act covered environmental bases sufficiently to prevent "zero sum" conflicts. For example, the technology-improving provisions were to lead to the minimization and "possible elimination" of risks to the environment. *See* H.R. REP. NO., 590, 95th Cong., 2d Sess. 123, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1529.

[58] 43 U.S.C. § 1346; 30 C.F.R. § 256.82 (1985).

[59] 43 U.S.C. §§ 1332, 1344, 1345, 1349, 1351, 1352.

[60] *Id.* § 1334(a)(1).

[61] *Id.* § 1334(a)(2).

[62] *Id.* § 1349. According to the legislative history, the test for standing to sue is the broad test set out in Sierra Club v. Morton, 405 U.S. 727 (1972). Standing thus is afforded not only to those who have an economic interest or who have or are likely to suffer tortious injury, but also to those with a definable environmental interest that has been or may be adversely affected. *See* H.R. REP. NO. 590, 95th Cong., 2d Sess. 161, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1567. A suit cannot be commenced until 60 days after written notice of the alleged violation is given to the alleged violator and any other appropriate federal official and to the state where the alleged violation occurred. The suit cannot be heard if the government has commenced an action against the alleged violator. The complainant may intervene in the government action, however. The sixty

2. *Marine Protection, Research, and Sanctuaries Act*

The Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA)[63] deals explicitly with ocean pollution issues. Titles I and II address the problems associated with the pollution of ocean areas caused when the ocean is used as a public dump. Title I, the Ocean Dumping Act, establishes a permit system to regulate intentional dumping of materials into the ocean.[64] Title II is the research component of the Act designed to assess the effects of such dumping on marine resources.[65] Title III provides for the establishment of marine sanctuaries for the purpose of providing a comprehensive approach to conservation and management of special areas of the environment.[66]

No part of the statute contains explicit trust language similar to that contained in the OCSLA, though specific provisions are made to protect and enhance traditional public trust uses. For example, the National Oceanic and Atmospheric Administration (NOAA), which administers the Marine Sanctuaries Program, has defined four goals for sanctuaries: (1) to enhance resource protection through comprehensive long-term management plans tailored to specific resources; (2) to promote and coordinate research that will expand scientific knowledge of significant marine resources and improve management decisionmaking; (3) to enhance public awareness, understanding, and wise use of the marine environment through interpretative and recreational programs; and (4) to provide for optimum compatible public and private uses of special marine areas.[67] The Marine Sanctuaries Program has had a stormy history and its original strong protectionist spirit has given way to multiple use pressures.[68]

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day waiting period is waived in the event of an imminent threat to health or safety or to a legal interest of the plaintiff. 43 U.S.C. § 1349.

[63] 33 U.S.C. §§ 1401-1445; 16 U.S.C. §§ 1431-1439.

[64] Ocean Dumping Act, 33 U.S.C. §§ 1412-1414. The Ocean Dumping Act is administered primarily by the Environmental Protection Agency. However, the Army Corps of Engineers is responsible for the dredge spoil disposal permit program under the Act.

[65] *Id.* §§ 1442-1445.

[66] Marine Sanctuaries Amendments of 1984, 16 U.S.C. § 1431.

[67] 15 C.F.R. § 922.1(b) (1985).

[68] Major amendments in 1984 essentially rewrote the Act. Originally, the Secretary of Commerce was given ultimate authority over managing activities within a sanctuary for protecting and preserving resources in the area. In recognition of recent "multiple use" trends for public resources, a new policy has been articulated. The new policy is to conserve and manage areas in a manner which com-

The Ocean Dumping Act reflects the government's interest in protecting the marine environment from degradation that would endanger the marine ecosystem and beneficial uses associated with it. As such it incorporates an important trust purpose. Two examples are pertinent here. First, the test for allowing the dumping of materials other than fish processing wastes is one of "unreasonable degradation;" these materials can be dumped only in specially designated areas.[69] Second, before a permit can be issued by the Environmental Protection Agency (EPA), a determination of "no unreasonable degradation" and "no endangerment" to human life or the marine environment must be made. This determination must take into account, among other things: (1) the effect of the dumping on human health and welfare (including economic, aesthetic, and recreational values); (2) effects on marine ecosystems; and (3) effects on alternate uses of the ocean such as fishing, scientific study, and living and nonliving resource exploitation.[70] Like the OCSLA, the Ocean Dumping Act contains a citizen suit provision giving the general public limited rights to ensure that the government is enforcing the law and that permittees are in compliance.[71]

3. *Magnuson Fishery Conservation and Management Act*

Congress passed the Magnuson Fishery Conservation and Management Act[72] (MFCMA) in 1976 to protect and promote the U.S. domestic fishery by extending the exclusive fishery zone from 12 to 200 miles and setting up a scheme for managing fishery resources within that zone. Here again, the Act does not contain specific trust language, but the overall purpose of the MFCMA is

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plements existing regulatory authority and facilitates all public and private uses not prohibited by other laws. While the primary goal still is resource protection, the amendments and regulations not only have seriously eroded the extent of protection afforded, but also have limited the potential areas that could become sanctuaries. Pub. L. No. 98-498, 98 Stat. 2296, (codified at 16 U.S.C. §§ 1431-1439 (1985)).

[69] 33 U.S.C. § 1412. The Ocean Dumping Act treats the fishing industry more liberally than others. The discard of fish processing waste is exempt unless deposited in harbors or other areas where such dumping could "endanger health, the environment or ecological systems." *Id.* § 1412(d).

[70] *Id.* Specific criteria for evaluating the environmental impact of a permit can be found at 40 C.F.R. § 227 (1985).

[71] 33 U.S.C. § 1415(g).

[72] 16 U.S.C. §§ 1801-1882. Tuna is specifically exempted from regulation under the Act. *Id.* §§ 1801(b)(1)(A), 1802(14). The Act also covers sedentary species on the continental shelf. *Id.* §§ 1801(b)(1)(B), 1802(4).

consistent with public stewardship principles. Congress made specific findings in the Act that the offshore fisheries constitute a valuable renewable natural resource which "contribute to the food supply, economy, and health of the Nation and provide recreational opportunities."[73] Implicit in the Act is the recognition that fishery resources are being overfished in the absence of sufficiently comprehensive and enforceable conservation and management measures. To prevent future stock depletions, the MFCMA established national standards to be used as guidelines in creating regional fishery management plans (FMP).[74] These standards support the concept of fisheries as common property by specifically forbidding management measures that discriminate among citizens of different states or that result in an individual, corporation, or other entity acquiring an excessive share of the fishery.[75]

The legislative history of the MFCMA specifically acknowledges fisheries as a "common property resource in which there is no ownership of the resource. . . ."[76] It also recognizes other public trust uses in the area by stating that the policy is "not to authorize any impediment to, or interference with, lawful activities on the high seas, except as they may relate to the conservation and protection of fisheries resources as provided by this Act."[77]

The MFCMA contains no citizen suit provision to enforce regulations implemented pursuant to FMP's. In fact, judicial review is quite limited. Regulations issued pursuant to a FMP may be reviewed only if a petition for review is filed within thirty days from promulgation of the regulations.[78] Furthermore, the scope of review is restricted to the standards of (a) arbitrary and capricious conduct, (b) conduct in excess of statutory jurisdiction, (c) failure to follow procedural requirements, and (d) conduct contrary to a constitutional right or power.[79]

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[73] *Id.* § 1801(1).

[74] *Id.* § 1851.

[75] *Id.* § 1851(a)(4).

[76] H.R. REP. No. 445, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 593, 600.

[77] *Id.* at 46, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 614.

[78] 16 U.S.C. § 1855(d).

[79] 5 U.S.C. § 706 (1982).

4. *National Environmental Policy Act*

The National Environmental Policy Act of 1969[80] (NEPA) is often credited with ushering in the environmental movement of the 1970's. The purpose of NEPA is to ensure that environmental values are weighed and given appropriate consideration in federal policy formulation, decisionmaking, and administrative actions. It requires preparation of a detailed environmental impact statement (EIS) for major federal actions that significantly affect the quality of the human environment.[81] The EIS must include a discussion of environmental impacts of the proposed action, unavoidable adverse environmental effects of implementing a proposal, alternatives to the proposed action, long and short term impacts, and any irreversible or irretrievable commitments of resources involved in implementing the project.[82] A complete discussion of the ramifications of NEPA lies beyond the scope of this Article.[83] However, it is worth noting that most EEZ resource allocation decisions require an EIS at some stage in the decisionmaking process.[84]

5. *Marine Mammal Protection Act*

The Marine Mammal Protection Act[85] (MMPA) was passed in 1972 in response to highly publicized incidents of wanton and inhumane killing of marine mammals for profit and recreation,[86] and killing incidental to certain fishery practices such as in the tuna purse seine industry.[87] The MMPA requires the Depart-

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[80] 42 U.S.C. §§ 4331-4361.

[81] *Id.* § 4332(2)(C).

[82] *Id.*

[83] For analyses of NEPA, see WILLIAM RODGERS, JR., ENVIRONMENTAL LAW (1977); GRAD, 2 TREATISE ON ENVIRONMENTAL LAW §§ 9.01-.07 (1985).

[84] For example, NEPA is applicable to the preparation of fishery management plans pursuant to MFCMA (50 C.F.R. § 602 (1985)); offshore oil and gas leasing (40 C.F.R. §§ 1500-1508 (1985)); designating ocean dumpsites (40 C.F.R. § 227 (1985)); and designating marine sanctuaries (15 C.F.R. § 922 (1985)).

[85] 16 U.S.C. §§ 1361-1407.

[86] "Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals . . . have only rarely benefitted from our interest: they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved." H.R. REP. No. 707, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4144, 4144-45.

[87] "U.S. citizens have never deliberately set out to kill these latter animals (porpoises and dolphins), although in recent years many have been caught by

ments of Commerce and Interior, two agencies which jointly administer the Act, to develop management programs for species whose stocks are certified as depleted. Permits are required for taking[88] such mammals.[89] Special provisions are made in the MMPA to address the problems associated with the incidental take of porpoises by the yellowfin tuna industry.[90]

Interestingly, neither the legislative history nor the language of the Act refer to marine mammals in trust resource terms. The Act describes the mammals as "resources of great international significance, esthetic and recreational as well as economic," and states that "the primary objective of their management should be to maintain the health and stability of the marine ecosystem."[91] Congress cited the commerce clause of the Constitution as its source of authority for regulating marine mammal takings.[92] Marine mammals, then, are not categorized as public trust resources but are given strong statutory protection nonetheless.

U.S. fishermen as an inadvertent consequence of commercial fishing for tuna with purse seines. It appears that many porpoises caught by tuna nets have been killed in the past—general estimates range from 200 to 400 thousand per year." *Id.* at 15, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4148.

[88] "Taking" is defined broadly to include attempting to or actually harassing, hunting, capturing, or killing marine mammals. 16 U.S.C. § 1362(12). The legislative history indicates that this definition is broad enough to encompass excessive or wanton use of herbicides in areas draining into marine mammal habitat and the operation of powerboats. *Id.* at 18, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4150.

[89] 16 U.S.C. §§ 1371-1374. The burden lies on the permit applicant to show that the taking should be allowed and will not work to the disadvantage of the stock. The Act authorizes restrictions and prohibitions on the importation of marine mammals taken by methods that would not be permitted if the animal were captured by persons subject to U.S. jurisdiction.

[90] *Id.* § 1371(2). The goal of the Act with regard to incidental take is to reduce such take to insignificant levels approaching a zero mortality and serious injury rate.

[91] 16 U.S.C. § 1361(6).

[92] "There can be no question of the constitutional power of the Congress to regulate traffic in these animals and their products, deeply involved as they are in interstate and foreign commerce." H.R. REP. NO. 707, 92d Cong., 2d Sess. 12, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4145. Also,

> marine mammals and marine mammal products either—(A) move in interstate commerce, or (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce, and . . . the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce.

16 U.S.C. § 1361(5).

6. *The Endangered Species Act*

The Endangered Species Act[93] (ESA) was passed to provide protection for species of fish, wildlife, and plants facing extinction. The Act authorizes the establishment of a list of endangered and threatened species and designation of areas of critical habitat.[94] Once a species is listed, federal agencies are prohibited from taking or authorizing actions which would jeopardize the existence of the species or which would result in the modification or destruction of its critical habitat.[95] Although specific trust language is not used in the ESA, the duties of the government to safeguard the existence of species threatened with extinction are akin to a trust duty of protecting valuable natural resources. The Act applies to marine as well as terrestrial life.[96]

The above discussion illustrates the active role Congress has taken in the management of marine resources. The next section discusses the role of the courts under a judicially enforceable public trust doctrine.

B. Application of the Public Trust

1. *The Upland Public Land Trust*

The source of congressional power to dispose of public lands is the property clause of the Constitution.[97] The legislative history of the OCSLA indicates that Congress believes its authority over EEZ resources, at least as applicable to the minerals of the continental shelf, is derived from the property clause.[98] It is arguable, however, that congressional reliance on the property clause is misplaced.

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[93] 16 U.S.C. §§ 1531-1543 (1982).

[94] *Id.* § 1533. Areas of critical habitat are those areas populated by the listed species.

[95] *Id.* § 1536.

[96] A specific provision of the ESA, however, provides that if there is a more restrictive conflicting provision relating to an endangered species that is regulated under the MMPA, the MMPA is to take precedence. *Id.* § 1543.

[97] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and Other Property belonging to the United States. . . ." U.S. CONST. art. IV, § 3, cl. 2.

[98] Congress has a special constitutional responsibility to "make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. CONST., art. IV, § 3, cl. 2. The Outer Continental Shelf Lands Act is essentially a carte blanche delegation of authority to the Secretary of the Interior. H.R. REP. NO. 590, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1461.

As discussed above, the public trust doctrine that has developed for federal upland public lands under the property clause recognizes that the federal government has both sovereign and proprietary rights in those lands. In its sovereign capacity, the government holds the land for uses consistent with the public interest. In its proprietary capacity, the legislature can manage and dispose of the public domain in the same way as a private proprietor, including granting fee simple interests to private parties and prosecuting individuals for trespassing.[99]

Historically, congressional power pursuant to the property clause has been based upon the federal government's having fee simple title to both the surface and mineral rights in the property in question.[100] By contrast, the federal government does not claim title to the seabed and subsoil of the continental shelf beyond the territorial sea. Both the OCSLA and the EEZ Proclamation reserve only the exclusive right to explore and exploit the mineral resources of the shelf and superjacent waters. In fact, these enactments were carefully constructed to reflect a difference between the assertion of rights over the continental shelf and superjacent waters akin to a territorial sea and assertion of limited rights over the resources and the marine environment.[101]

Further support for a limited ownership concept is reflected in an opinion by the Fifth Circuit Court of Appeals that found the United States to have something less than a property right, consisting of neither ownership nor possession, in the OCS.[102] In *United States v. Alexander*, the Fifth Circuit overturned a criminal conviction under the OCSLA where the defendant destroyed some coral on the continental shelf while salvaging a sunken shrimp boat.[103] The court based its decision on an interpretation of the OCSLA which limits Interior's authority over the OCS to that of mineral management. It seems clear, then, that the federal government does not claim full ownership rights to the lands and

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[99] "The United States can prohibit absolutely or fix the terms on which its property may be used." *Light*, 220 U.S. at 536.

[100] The federal government acquired title to the public lands by cession from states, treaties with foreign countries and Indian tribes, or upon discovery and settlement. Title in these lands is held by the government for the benefit of the nation as a whole. *Shively*, 152 U.S. at 51.

[101] The United States consistently has supported a relatively narrow territorial sea and attempted to limit exercises of sovereignty into traditional high seas areas, including the continental shelf. M. MCDOUGAL & W. BURKE, *supra* note 9.

[102] United States v. Ray, 423 F.2d 16 (5th Cir. 1970).

[103] 602 F.2d 1228 (5th Cir. 1979).

waters of the EEZ as it does the interior public lands. As such, the property clause is a poor source of authority for congressional power to manage EEZ resources.

2. *Tidelands Trust*

(a) Applicability of the Tidelands Public Trust

On the other hand, it is more reasonable to apply a tidelands trust to the EEZ. As discussed above, ocean areas outside the limited territorial seas of coastal nations generally were considered high seas until the advent of the EEZ concept. Within this area, resources were regarded as common property to which all nations had equal rights. Although a specific international public trust as such has not been acknowledged over these resources, the customary doctrine of freedom of the high seas is based upon the same commons concepts from which the public trust doctrine developed. The rights secured on the high seas are the same as those traditionally protected by the public trust—fisheries, navigation, and commerce.[104] Present application of the public trust doctrine therefore is consistent with historic treatment of EEZ resources.

Under the Proclamation, the federal government now owns the living and nonliving resources of the EEZ in trust for the people of the United States. In addition, the government is obligated to preserve certain high seas common rights for the world community. This dual responsibility supports the need for an increased role of public stewardship beyond that provided under the current statutory regime. The tidelands public trust is an appropriate legal tool for exercising this stewardship. Because the rationale behind the existence of such a trust for tideland resources is equally applicable to the EEZ, it is arguable that the sovereign rights asserted over EEZ resources are burdened with a judicially enforceable trust obligation to protect the public's interest in these common resources.

(b) Scope of the Trust

Very little case law deals with the extent of the public trust doctrine in federally owned tidelands. The doctrine has been held applicable to tidelands ceded to the federal government by

[104] In fact, the EEZ Proclamation specifically recognizes the high seas rights such as navigation and preserves them for the world community. *See supra* note 1.

states;[105] however, case law has not been sufficient to delineate the scope of the trust. Until the controversial 1947 Supreme Court decision in *United States v. California*,[106] states consistently exercised sovereign rights in the waters off their coasts. The Court, though, decided in favor of federal sovereignty. Passage of the Submerged Lands Act in 1953 "returned" to state jurisdiction the coastal waters out to three miles.[107] As a result of these longstanding state claims to tidelands, most laws concerning a tideland trust developed independently within each state court system. Thus, to determine the scope of the doctrine as applicable to the federal government, it is necessary to draw analogies from federal and state court holdings in state public trust cases.

Certain common principles can be derived from a review of state cases. First, as stated by the Supreme Court in *Illinois Central*,[108] no absolute prohibition exists against the disposition of public trust properties. Tidal resources can be allocated to private entities so long as the government does not divest itself of its ability to control a "whole area" of submerged lands.[109] Courts enforcing the public trust look closely at reallocations favoring narrow constituencies. Second, the disposition cannot substantially impair the public interest in remaining areas.[110] Third, the resource must be maintained and held available for uses that benefit the public.[111] This holding is tempered by some courts which provide a limited exception for statutorily authorized conveyances that promote the general interests of the public.[112] Fourth, conveyances of public trust lands to private parties do not extinguish the trust; i.e., a new landowner cannot prohibit the public from exercising, in a reasonable manner, common rights such as fishing and

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[105] United States v. Groen, 72 F. Supp. 713 (D.D.C. 1947); United States v. Martin, *aff'd in part, rev'd in part*, 177 F.2d 733 (D.C. Cir. 1949).

[106] 381 U.S. 139 (1965).

[107] 43 U.S.C. §§ 1301-1356.

[108] *Illinois Central*, 146 U.S. 387 (1892).

[109] *Id.*

[110] *Id.* at 452-53.

[111] *See supra* note 37 and accompanying text.

[112] *Illinois Central*, 146 U.S. 387; University of South Alabama v. State of Alabama, Civ. Action No. CO-83-1262 (June 11, 1984) (being appealed to the Alabama Supreme Court); Treuting v. Bridge & Park Comm'n of Biloxi, 199 So.2d 627 (Miss. 1967).

navigation.[113] Finally, there are no definitive sets of priorities among trust uses.[114]

Central to the above principles is the existence of a government duty to manage trust resources so as not to extinguish the public's right to use them. Underlying this duty is a presumption that the legislature does not intend to violate the trust. Congress, then, can pass legislation managing EEZ public trust resources, but if such laws impair the trust, the courts have the authority to review the legislation or the administrative action taken pursuant to the law. This right of action, available to private citizens as well as governmental entities, should be separate from and in addition to any remedies available in the statutes themselves or the Administrative Procedures Act.[115]

(c) Application of the Public Trust

It could be argued that there is no need for such a judicial remedy in the EEZ. Since the passage of NEPA in 1969, Congress has enacted a number of laws designed to protect the environment,[116] including the marine environment, that presumably require the government to fulfill trust obligations commensurate with those of the public trust. In other words, these acts arguably supplant the need for a separate judicial public trust remedy.[117] While this analysis has some logical appeal, current environmental legislation fails to provide adequate remedies for trust violations, particularly in light of the rights oriented basis of the public trust doctrine.

First, the regulatory scheme in place prior to the EEZ Proclamation, passed in piecemeal fashion, essentially was single-pur-

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[113] Sax, *supra* note 27, at 487; *The Public Trust in Tidal Areas*, *supra* note 27, at 769-71.

[114] State v. Public Service Comm'n, 275 Wis. Ct. 112, 81 N.W.2d 71 (1957); State of Wisconsin v. Village of Lake Delton, 93 Wis. 2d 78, 286 N.W.2d 622 (Wis. Ct. App. 1979); Stevens, *supra* note 27, at 223-225.

[115] 5 U.S.C. §§ 701-706.

[116] *See supra* note 48.

[117] The Court of Appeals for the District of Columbia used just that rationale to justify denial of an extra-statutory trust responsibility to the Inupiat Eskimos. Although the issue was limited to a federal trust responsibility to Native American Indians, the court's language is quite broad. "The panel approved, in effect, the approach of 'confining the extension of "trust responsibility," *however defined and whatever the source*, to the area of overlap with the environmental statutes.' " California v. Watt, 668 F.2d 1290, 1325 (D.C. Cir. 1981) (emphasis in original).

pose. It had developed over the past 40 years in response to resource-specific claims extended by the United States into high seas. Under such a system few opportunities exist for the public to make tradeoffs among different marine uses. Even government agencies are limited in enforcing their authority over a resource beyond specific management objectives.[118]

Second, the standard of review under the various laws is less stringent than that available under a public trust review. For example, when substantial scientific uncertainty exists regarding the potential environmental effects of an action, courts have given great deference to agency decisionmakers under their legislatively delegated authority.[119] The Ocean Dumping Act requires the EPA to make a determination that dumping materials at a particular site would not unreasonably degrade the marine environment or endanger human life. Such a delegation of responsibility leaves the EPA administrator with tremendous discretion in accepting or rejecting scientific information regarding the hazards of disposal. Knowledge of the impact (both individually and cumulatively) of many pollutants on the marine environment is poor.[120] A mistake in judgment in favor of dumping would have serious consequences on renewable trust resources, particularly fisheries. It therefore is imperative that the traditional judicial soft glance be replaced by a public trust override that better can provide for a core level of protection for renewable resources dependent upon a healthy environment.

Neither will the hard look given agency actions by the courts always be effective.[121] The hard look ensures that agencies consider the significant environmental consequences of their deci-

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[118] *Ray*, 423 F.2d 16; *Alexander*, 602 F.2d 1228.

[119] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978). *Alaska* involved an EIS covering the lease sale of over 1,000,000 acres in the OCS off the coast of Alaska. The court held that under NEPA, once an agency decides that the cost of proceeding without more and better information regarding environmental impacts outweighs the benefits of proceeding with the project without delay, courts cannot substitute their judgment.

[120] Goldberg & Manzel, *Oceanic Pollution*, in WHO PROTECTS THE OCEAN 37-61 (1975).

[121] Cappaert v. United States, 426 U.S. 128 (1976) (pupfish, protected by a federal water reservation for Devil's Home National Monument, were given strong protection, but a "reasoned compromise" over the amount of water necessary for the pupfish failed to ensure the pupfish's survival).

sion.[122] But the ultimate test is one of reasonableness, and deference always is granted the administrative agencies.[123] Because the presumption that the legislature does not intend to violate its trust duties elevates these concerns to a priority position in an agency's decisionmaking process, the public trust doctrine provides judicial review a step beyond the hard look.

The standard articulated by the courts for making conflicting use decisions under the OCSLA is a good example of the deference given to an administrative agency's decisionmaking process. The leading case in this regard, *Massachusetts v. Andrus*,[124] is evidence of a low standard of review similar to that found in the interior public trust. As a result, no priority was given to trust purposes. This case represents a classic stand-off between potentially incompatible uses: fisheries and offshore oil and gas production. The conflict occurred over the issuance of oil and gas leases in the Georges Bank area off the New England coast, an area described in the final EIS as "one of the most productive fishing grounds in the world."[125] The OCSLA provision under review was the section preserving the rights of navigation and fishing in the superjacent waters.[126] The court rejected the arguments of both sides claiming priority in all situations.

First, the court interpreted the "non-interference with fisheries" language as a confirmation of "the legal right to fish" rather than as a prohibition against physical impediments to fishing.[127] Second, the court discussed the extent of that right, noting that the OCSLA imposes a duty upon Interior to ensure that oil and gas

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[122] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (requiring a fully explained, reasoned judgment by administrative agencies). For a brief discussion of the scope of judicial review of agency decisionmaking, see RODGERS, *supra* note 83, at 16-23.

[123] "The 'substantial injury' or hard look doctrine . . . means that courts will accept nothing less than fairly conceived, fully explained, and rationally based administrative discretionary judgements." RODGERS, *supra* note 83, at 19.

[124] 594 F.2d 872 (1st Cir. 1979).

[125] *Id.* at 874. For a discussion of the living resources of Georges Bank, see NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, GEORGES BANK MARINE SANCTUARY ISSUE PAPER 11-16, 18-23 (1979), *reprinted in* U.S. DEPARTMENT OF INTERIOR, FINAL SUPPLEMENT TO ENVIRONMENTAL STATEMENT FOR PROPOSED OCS OIL AND GAS LEASE SALE, NORTH ATLANTIC OCS SALE NO. 42.

[126] The provision reads: "[T]his subchapter shall be construed in such a manner that the character of the waters above the Outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected. . . ." 43 U.S.C. § 1332.

[127] *Massachusetts*, 594 F.2d at 889.

activities are conducted without "unreasonable risk to the fisheries."[128] The court next stated that when two sets of interests conflict, the Secretary is to achieve "a proper balance" when deciding which use should receive priority. Under this analysis, if the "proper balance" test is fulfilled, there is no need to sacrifice one interest to the other. This part of the reasoning apparently resolves the issue by extending the conflict beyond the Georges Bank area to the total of all possible conflicts between oil and gas and the environment off all the U.S. coasts. Thus conceivably a particular fishery in a particular area could be sacrificed so long as fisheries are not always subordinated nationwide. The court's next analysis is one of avoiding serious harm to the fisheries. Finally, the court states that Interior has a legal duty "to see that the great life systems of the ocean are not unreasonably jeopardized by activities undertaken to extract oil and gas from the seabed."[129]

In sum, the case stands for the following propositions: (1) The public has a legal right to fish in the waters superjacent to the continental shelf; (2) The government has a legal right to authorize activities associated with oil and gas development on the continental shelf; (3) OCS oil and gas activities will be allowed to interfere with the public's right to fish if the risk to the fisheries caused by such activities is not unreasonable; (4) The public's right to fish and the government's right to lease particular OCS resources must be "properly balanced" across the national spectrum of OCS leasing; (5) OCS oil and gas activities will be allowed to cause harm to fisheries so long as the harm is not serious; (6) Ocean resources will be allowed to be jeopardized by oil and gas activities if such jeopardy is not unreasonable. Read liberally, the court's reasoning could result in serious impairment to one of the longest-standing public trust rights: freedom of fishing.[130]

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[128] *Id.* The court did not delineate specific factors to be considered in the balance, but rather left the Secretary to "determine which interests must give way, and to what degree, in order to achieve a proper balance." *Id.*

[129] *Id.* at 892.

[130] The court's language indicates that its standard of evaluation was equivalent to the more liberal inland public trust standard. Citing three public land trust cases, the court stated: "Such a duty would be in keeping with the longstanding view of the Secretary as 'the guardian of the people of the United States' who is bound to see that 'none of the public domain is wasted or is disposed of to a party not entitled to it.' " *Id.* at 890 (quoting Knight v. United States Land Ass'n, 142 U.S. 161, 181 (1891)).

Under the tidal public trust theory, a higher standard of duty would be imposed on Interior to protect the fishery resources. Professor Sax, a leading authority in public trust law, frames the court's review in this way:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties. [131]

Oil and gas activities which would interfere with traditional public uses should be subject to intense scrutiny under the public trust rationale for several reasons. First, one agenda of the OCSLA is to expedite the leasing of OCS lands. At least one recent Secretary of the Interior has interpreted this as giving him a broad mandate to open the entire OCS of the United States for oil and gas leasing and exploration at a rapid pace.[132] Such large scale divestiture of public resources into private hands is a contemporary example of the type of abrogation of the public trust that the court in *Illinois Central* attempted to guard against.

Second, pollution associated with oil and gas development can pose a significant risk to other public trust uses. The OCSLA recognizes this potential conflict, but also seems to reflect an optimistic attitude that the two uses are not mutually exclusive. Provisions in the Act for oil spill and fishermen's gear funds can be read as a sort of fail-safe mechanism to ameliorate the damages that ultimately will occur from offshore mineral development. Several provisions require a weighing of environmental interests. Under the public trust doctrine, however, a court would strictly enforce statutory provisions that impose environmental safeguards on offshore mineral development. Compatible with the presumption that the government does not ordinarily intend to permit a utilization of trust property that lessens public uses and promotes private profits, a court would take a close look at the extent to

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[131] Sax, *supra* note 27, at 490.

[132] The goal of Secretary Watt's five-year lease plan (1982-87) under the OCSLA was to make available over one billion acres of the OCS. Prior to this, lease offerings were made for specific sea-bottom tracts. For a discussion of the controversy surrounding Watt's OCS leasing program, see Mills, *Watt's OCS Leasing Program Progress Report*, 3 WATER LOG 4 (April-June 1983).

which the decision would interfere with the public trust obligation.[133]

A third reason that *Massachusetts* would have resulted differently under a public trust theory lies in the distinction between the nature of the resources involved. Fisheries are a renewable resource which, if managed properly, can provide a perpetual source of both food and economic wealth. Successful management of fisheries includes the need to manage fisheries habitat to prevent degradation that ultimately would threaten the resource. Protection of the marine environment therefore is an important component of management. Oil and gas, on the other hand, are nonrenewable resources, development and management of which are dependent primarily upon the state of the art of technology for discovery, extraction, transportation, and processing. Advances in technology permit exploitation of the resource in environmentally inhospitable areas. Development of such technology should be encouraged for the sake of efficiency and environmental safety. In recognition of these differences, fisheries should be afforded a trust status superior to that of oil and gas development. In situations where scientific information bearing on the effect of oil and gas development on the marine environment is conflicting, decisions based on such information should be resolved in favor of protecting the fisheries resource. Such a result could be reached under a public trust rationale.

One of the benefits of the trust doctrine is that it permits management of resources over time. A preference for fisheries when the two uses conflict over environment considerations would not be detrimental to either fisheries or oil and gas development. Advances in technology over time can resolve the safety issues. When that occurs, an area once closed to leasing could be reopened. This policy would encourage development of technology that is both efficient and environmentally sound and protect the fisheries from suffering from an otherwise "reasonable" error of judgment.

There are many situations in which the tidelands public trust would be applicable. The above analysis illustrates the approach that would be taken in similar circumstances.

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[133] In a similar manner, the Massachusetts Supreme Court has interpreted narrowly a statute allowing extensive private development of a public park. The trust being interpreted by the court was equivalent to the tidelands trust. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).

CONCLUSION

The EEZ Proclamation for the first time makes a comprehensive sovereign claim over the marine resources within 200 miles of the United States coastline. Resources encompassed by the Proclamation are the type that receive elevated status under the tidal public trust doctrine applicable in the territorial sea and coastal waters. They are held by the government in trust for the people of the United States. In addition, because the federal government does not claim exclusive ownership of the seabed and subsoil or of the water column, the international community retains certain high seas rights in the EEZ. Therefore, the government has a high duty to protect rights in the EEZ akin to those covered by the tidelands public trust.

The current statutory framework for marine resource management was passed in patchwork fashion. Since there was no claim to the totality of the resources prior to the EEZ Proclamation, these laws developed separately in response to a perceived resource management problem. Not all of the statutes contain trust language for the resource being managed. And none shows recognition of the trust duty of the government over all the marine resources in the EEZ. As such, existing legislation is not sufficient to ensure that agency decisions will not abrogate the trust.

There is little indication that Congress will pass comprehensive EEZ resource legislation in the near future. In fact, the National Advisory Committee on Oceans and Atmosphere (the advisory body of the President and Congress on ocean policy issues) recently concluded that no need exists for comprehensive implementing legislation for the EEZ Proclamation.[134] Therefore, other mechanisms must be explored for ensuring that the public's interest in the long-term protection and utilization of valuable marine resources is not subverted to short-term economic gain. The judiciary has shown its ability in state tidelands cases to oversee the discharge of this important duty. Adoption of a similar public

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[134] NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, THE EXCLUSIVE ECONOMIC ZONE OF THE UNITED STATES: SOME IMMEDIATE POLICY ISSUES, A SPECIAL REPORT TO THE PRESIDENT AND THE CONGRESS (May, 1984). Other writers have come to similar conclusions. HELLE, *Conflict Resolution and Multiple-Use Management in the Exclusive Economic Zone*, in 84 OCEANS EXCLUSIVE ECONOMIC ZONE PAPERS 10 (1984); Belsky, *International Issues Raised by the Exclusive Economic Zone*, in *id.* at 106 (concerned with the international aspects of unilateral implementation of the EEZ Proclamation).

trust doctrine to oversee EEZ resource decisionmaking is one way for the courts to protect this interest.